

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1172 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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MANGABHAI RAVJIBHAI MAKWANA

Versus

STATE OF GUJARAT

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Appearance:

MS DR KACHHAVAH for Petitioner

MR UA TRIVEDI, APP, for Respondent No. 1

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CORAM : MR.JUSTICE R.K.ABICHANDANI and  
MR.JUSTICE A.L.DAVE

Date of decision: 06/07/98

ORAL ORDER ( Per A.L. Dave, J. )

1. One Rekhaben, daughter of Mangabhai Ravjibhai Makwana, sustained burns injuries on 12th April, 1997, at about 12.30 p.m. She was in the house when she sustained the injuries and upon people seeing smoke coming out of the house, door was opened and she was found to be

burning. The fire was set out and she was taken to the hospital. At the hospital, she was given treatment by the doctor. The doctor informed the police and in turn the Executive Magistrate was summoned to record the dying declaration of Rekhaben. The police also recorded her complaint. Rekhaben implicated her father of setting her ablaze after pouring kerosene. The police, therefore, registered the offence against her father-Mangabhai Ravjibhai Makwana, who is the appellant before this Court. Rekhaben, ultimately, succumbed to the burns injuries and expired on

2. After the investigation, the police found that there was ample material connecting the accused with the offence and the police, therefore, charge sheeted the appellant-accused for murder of Rekhaben under Section 302 of Indian Penal Code. The case was committed to the Court of learned Sessions Judge, at Bhavnagar. Sessions Case No.87 of 1997 was registered. The charge was framed against the accused. The accused pleaded not guilty and expressed his desire to face the trial. The learned Sessions Judge, after recording the evidence and considering the same, came to a conclusion that the prosecution was able to establish the guilt of the accused and passed the impugned judgment and order convicting the accused for murder of Rekhaben and sentenced him to undergo rigorous imprisonment for life.

3. By this appeal, the said judgment and order is assailed on various grounds stated in the memo of appeal.

4. Upon the matter coming up for admission hearing, the record and proceedings were called for from the Sessions Court, Bhavnagar, and are before us.

5. We have heard Ms. D.R. Kachhavah, learned counsel for the appellant and Mr. U.A. Trivedi, learned Additional Public Prosecutor, for the respondent State.

6. Ms. Kachhavah has taken us through the entire evidence emphasizing on various aspects in detail and at length.

7. The bone of contentions raised by Ms. Kachhavah is that the dying declarations recorded by the Executive Magistrate and by the Police in the nature of the complaint do not corroborate each other. They are self-contradictory and, therefore, the learned Sessions Judge ought not to have placed any reliance on this evidence. She further submitted that the evidence of the doctor indicates that the doctor had not taken care to

examine her even primarily before giving opinion about her consciousness. Pulse were not recorded and blood pressure was also not taken and recorded, which is very important for deciding the state of health of a person and, therefore, the dying declaration recorded by the Executive Magistrate ought not to have been believed by the learned Sessions Judge. She has read the deposition of Babiben, mother of deceased-Rekhaben and wife of present appellant. She had not supported the prosecution version and, therefore, declared hostile. She stated that the accused had left the house before the incident occurred. Ms. Kachhavah, therefore, pressed that the presence of the accused ought not to have been believed in the house at the relevant time and his conviction is, therefore, not well founded.

Ms. Kachhavah has then drawn our attention to the possibility of death of Rekhaben being suicidal one. She submitted that the witness-Ramesh Valji Wanjha had admitted in his cross-examination that the door was required to be broken open by giving kicks and when they entered, they found Rekhaben burning. If the accused had set her to fire, the door could not have been locked from inside and, therefore, the learned Sessions Judge has committed an error in overlooking this aspect.

Ms. Kachhavah has then drawn our attention to the fact that the dying declarations recorded by the Executive Magistrate, Ex.30 and the complaint which is also considered as a dying declaration recorded by the Police Officer, Ex.40, are self-contradictory. In this regard, she has drawn our attention to the fact that the entire story about slap being given by the father accused - to Rekhaben at the place of a friend of one Bharat is absent in the dying declaration before the doctor and, therefore, either of the dying declarations is false and cannot be relied upon. She submitted that while recording Ex.40, the Police Officer has not taken any certificate of consciousness of the deceased at the relevant time from the doctor. Regarding thumb impression on the dying declarations, she submitted that the Inquest Panchnama states that both the palms were totally burnt and, therefore, thumb impression could not have been taken, resultantly, the learned Sessions Judge ought to have given benefit to the accused. Last but not the least, Ms. Kachhavah submitted that the incident, if it is believed to have occurred in the manner in which the prosecution has advanced its story, then also, it would be at the most a case falling under exception I or exception IV of Section 300 of the Indian Penal Code and, therefore also, the accused could not have been convicted

under Section 302 but could have been convicted under Section 304 Part II of the Indian Penal Code. She, therefore, urged that the appeal be admitted and the sentence awarded to the appellant be suspended and the appellant be released on bail.

8. On the other hand, Mr. U.A. Trivedi, learned Additional Public Prosecutor, has opposed this appeal. He submitted that the contradictions highlighted by Ms. Kachhavah are only minor contradictions and do not affect the core of the prosecution case. He submitted that the doctor was present when the Executive Magistrate recorded the dying declaration. The doctor has certified the consciousness of the deceased-Rekhaben before the dying declaration was recorded and after it was completed. Even in the Yadi written to the police, there is a mention about the patient being conscious and, therefore, there is no reason to doubt the consciousness of the patient while her dying declaration was recorded. Mr. Trivedi then urged that, if the Inquest Panchnama is read properly, it only indicates that both the palms of Rekhaben were burnt, not the fingers or finger tips and so also the thumb or thumb tips and, therefore, there is no reason to doubt the dying declarations. As regards the version emerging from the deposition of Ramesh Valji Wanja, Mr. Trivedi submitted that the witness was hostile to the prosecution. In fact, if the Panchnama of the place of offence is read, it makes it abundantly clear that the door was intact and was possible to be locked from inside. It was in fact locked and then pushed from outside with the help of panch witness and after two or three kicks, it was broken open. Thus, the version of Ramesh Valji Wanja cannot be placed reliance on. Mr. Trivedi then urged that there is no reason to disbelieve the independent officers like doctor and Executive Magistrate, in whose presence the deceased gave dying declaration. There is no reason to disbelieve the contents of dying declarations because no girl would falsely implicate her father particularly when she is on the verge of death. Under the circumstances, Mr. Trivedi has urged to dismiss this appeal, at this stage.

(07.07.1998 dictation continued)

9. Today, when we were about to continue the dictation of this order, Ms. Kachhavah requested for further audience to enable her to cite certain decisions and to show further certain infirmities in the prosecution case against the appellant. Though the request was unusual, permission was granted in the interest of justice.

10. Before we proceed with the merits of the case, it would be proper, if Ms. Kachhavah's arguments are incorporated at this stage. Ms. Kachhavah has placed reliance on the following two decisions :-

(1) Kishori Das v. State of West Bengal, 1997 Criminal Law Journal, 315.

(2) K. Ramachandra Reddy and another v. The Public Prosecutor, AIR 1976 SC 1994.

She submitted that the principles enunciated in these decisions, if considered, indicate that dying declarations can only be relied upon, if they are found to have been given in a free atmosphere, in a fit state of mind and voluntarily by the deceased, and to ensure this, there has to be an endorsement about the fit state of mind and health of the deceased issued by the doctor. Ms. Kachhavah submitted that, if deposition of the Executive Magistrate is considered, he stated that the body of the certificate purporting to have been given by the doctor regarding evidence of the deceased-Rekhaven was, in fact, written in the hands of the Executive Magistrate himself and it was only signed by the doctor and, therefore, it cannot be said to be a certificate issued by the doctor himself. Regarding the other dying declaration, Ex.40 before P.S.I. Vaghela, Ms. Kachhavah submitted that there is no endorsement whatsoever by the doctor certifying about the health of the deceased at the relevant time. Under these circumstances, neither of the dying declarations could have been relied upon, as has been done by the learned Sessions Judge. Benefit must go to the accused-appellant.

11. As regards the thumb impression, Ms. Kachhavah submitted that Pravin Dave, who has identified the thumb impression of the deceased, though examined as Panch witness, was not put any question regarding him having identified the thumb impression of the deceased. According to Ms. Kachhavah, that vitally important factor has not been considered by the learned Sessions Judge in light of the fact that both the hands of the deceased were clearly injured by burns. She, therefore, urged that the finding of the learned Sessions Judge is not proper and needs a detailed consideration by this Court.

12. Mr. Trivedi argued that the contradictions are minor, that the certificate about fitness of the deceased

given by the doctor is signed by the doctor, the doctor has admitted to have given this certificate, the doctor was present throughout the recording of the dying declaration by the Executive Magistrate and, therefore, merely because body of the certificate was written by the Executive Magistrate, it cannot be said that the certificate was not issued by the doctor. Corroborative factor to connect the accused with the offence is that, on the second day, when the accused was apprehended, his clothes carried kerosene smell. This fact is also certified by F.S.L. report and, therefore, the judgment and order of the learned Sessions Judge does not suffer from any infirmity and, therefore, does not call for any interference by this Court and the appeal may be dismissed.

13. We have been taken through the entire evidence thoroughly by Ms. Kachhavah. It is true that the prosecution case and the consequent judgment and order of the learned Sessions Judge are based on the dying declaration. There cannot be any difference of opinion regarding the fact that a dying declaration, if found to be trustworthy and reliable, conviction can be based solely on the basis of such dying declaration. To ensure that dying declaration is reliable and trustworthy, the Court has to give a close scrutiny and, as has been enunciated in the case of K.R. Reddy v. The Public Prosecutor, AIR 1976 SC 1994, a certificate has to be obtained from the Medical Officer to ensure that the patient was in fit state of health and mind to give dying declaration. It is also to be ensured that the dying declaration is given in a free atmosphere realising its effect and, therefore, ordinarily, when such dying declarations are recorded, no relative or police official is kept in vicinity to eliminate the chances of tutoring and prompting and, if, after testing the dying declaration on such touch stone, it is found to be genuine, reliance may be placed and conviction can be made on the basis of such dying declaration.

14. In the instant case, we have two dying declarations before us. One is made before the Executive Magistrate, which is at Ex.30. This dying declaration directly inculpatates the accused. The Executive Magistrate had deposed on oath at Ex.28 and he stated that he had himself personally verified about the consciousness and condition of the deceased Rekhaven. A certificate was also obtained from the Medical Officer before he commenced the recording of the dying declaration. The doctor was present throughout the time when the dying declaration was recorded and, after the

dying declaration was completed, a certificate from the doctor was obtained about the state of health of the deceased-Rekhaben, wherein the doctor has certified that she was conscious. Thumb impression was taken on the dying declaration and endorsement was made by the Executive Magistrate certifying that it was before him and so also by the Medical Officer. This version of the Executive Magistrate has been tested on the touch stone of cross-examination, wherein it has remained unshaken. The version of the Executive Magistrate also gets corroboration from the deposition of the Medical Officer, Dr. Kuhadia. It also emerges from the deposition of the Executive Magistrate that when he went to record the dying declaration, the deceased was alone and there was no one nearby. No relative was nearby nor was any police personnel present and, thereafter, the dying declaration was recorded.

15. In light of these facts, we are of the firm view that no error is committed by the learned Sessions Judge in placing reliance on the dying declaration recorded by the Executive Magistrate, which is at Ex.30.

16. It is true that the version that is emerging in the complaint before P.S.I. Vaghela, at Ex.40, which is also treated as dying declaration by the learned Sessions Judge, regarding slap having been given by the accused-appellant to the deceased at the place of friend of Bharatbhai is not finding its place in the dying declaration before the Executive Magistrate. But this omission cannot assume importance or force to brush aside the dying declaration made before the Executive Magistrate, which is backed by the deposition of the Executive Magistrate and that of the Medical Officer, the two independent officers who may have no interest either in the prosecution or the defence side. Likewise, the thumb impression on the dying declaration before the Executive Magistrate is certified to have been taken before both the Executive Magistrate and the Medical Officer and, therefore, there is no reason to doubt this thumb impression merely on an admission made by Panch-Batukbhai Talsibhai Makwana that both the hands of the deceased were burnt. In fact, if Inquest Panchnama is perused, it indicates that only the palms were burnt and not the thumbs or fingers.

17. A doubt is sought to be raised about the occurrence on the basis that the doctor had recorded the history about the deceased having sustained burns at home. It was urged that the deceased did not say as to how she had sustained burns nor did she inculcate the

accused-appellant at that stage. However, if we see the medical case paper, it is clear that it was only a brief history scribbled by the doctor in a hurry. It is also possible that the history was given by the relatives of the deceased, who took her to the hospital because there is a mention in the bracket in Gujarati vernacular to the effect that it was by the relatives.

18. A serious doubt is raised about the consciousness of the deceased-Rekhaben while giving dying declaration as the doctor had not mentioned in the medical case paper Ex.34 the pulse and blood pressure of the deceased when she was brought before the doctor. It is worth the mention that this very case paper indicates that the condition of the deceased when she was brought to the hospital was serious and she had sustained 90 to 95% burns. Obviously, the doctor would be more keen to start with the treatment. On the contrary, not recording of blood pressure and pulse rate at that stage loses significance when this very case paper mentions that the patient was conscious at 1.15 p.m. The dying declaration was recorded at 1.50 p.m. and was completed at 2.10 p.m. Under the circumstances, there is no reason to doubt the dying declaration.

19. Attempt is made to assil the dying declaration before the Executive Magistrate, Ex.30, on the ground that certificate of consciousness purporting to have been given by the Medical Officer was written by the Executive Magistrate and only signed by the doctor, as per admission of the Executive Magistrate. May be it is so, but when the Medical Officer has signed it and has deposed to the effect that it was given by him, writing of the certificate by the Executive Magistrate cannot demolish the dying declaration.

20. As an alternative submission, it was argued by Ms. Kachhavah that the incident occurred in a manner which would and should give benefit to the accused of exception I or IV of Section 300 of the Indian Penal Code. We have considered the entire evidence and we do not find any suggestion in this regard to have been made by the defence. No such defence was ever taken. Even if that part is considered, it cannot be said that the incident occurred because of any provocation by the deceased. Considering the IVth exception of Section 300 of Indian Penal Code, it cannot be said that the accused has not acted in an unusual or cruel manner. The accused-appellant is the father of the deceased, who was against the love affair of the deceased with Bharat and in order that the deceased does not pursue her affair



with Bharat, the incident has occurred and, therefore, it cannot be said that the accused has not taken undue advantage of his relationship with the deceased. In any case, benefit of exception I or IV of Section 300, I.P.C. cannot be given to the appellant.

21. In view of the above facts, circumstances and discussion, we do not find any merit in the appeal. The judgment and order of the learned Sessions Judge convicting the accused appellant for murder of his daughter does not call for any interference and we, therefore, confirm the same. Appeal is, therefore, dismissed.

[ R.K. ABICHANDANI, J. ]

[ A.L. DAVE, J. ]

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